

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jon L. and Janet M. Johnson

Chapter 7

Debtor(s).

BK 04-31268

SUPPLEMENT TO MOTION TO DISMISS CHAPTER 7 CASE

1. The United States Trustee filed a motion to dismiss this case under Section 707(a) and (b), which is set for hearing on August 2, 2004 at 3:00 p.m.

2. The motion of the United States Trustee alleged that the United States Trustee wrote to the debtors for information and the debtors failed to respond to that request for information.

3. The debtors have since provided the information requested in the letter, and the United States Trustee withdraws the Section 707(a) "cause" action.

4. The pay stub of Janet Johnson for period ending April 24, 2004 averages to the following net income per month:^{1/}

YTD Gross	\$ 6,476.40
Less	
YTD Deductions	(1,263.85)
Net	\$ 5,212.55

8th or 9th pay period, UST treat as 9th. \$ 5,212.55 divided by 9 = \$ 579.17 x 26 pay periods = \$ 15,058.48 divided by 12 months = \$ 1,254.87 average net pay per month

5. Pay stub of John Johnson for period ending April 30, 2004 averages to the

^{1/} For both debtors, the pay stubs are not attached for privacy concerns. If the debtors failed to retain a copy of the documents provided to the U.S. Trustee, he will make those pay stubs available upon request.

following net income per month:

YTD Net Income \$15,655.49 + YTD 401K contribution \$1,665.23 = \$17,320.72 D Net Income²

\$ 17,320.72 divided by 9 = \$ 1,924.52 x 26 pay periods = \$ 50,037.64 divided by 12 months = \$ 4,169.80 average net pay per month. The figure appears to be accurate because Mr. Johnson's flat rate of 80 hours per pay period (which coincides with the April 30, 2004 pay stub) provides Net pay of \$ 1,677.91 + 401K contribution \$ 250.15 = \$ 1,928.06 net pay per month, which is slightly more than the average calculated above.

6. \$ 4,169.80 + \$ 1,254.87 = \$ 5,424.67 average net pay per month.

7. The debtors listed Schedule J expenses of 3,953.18 per month. Several expenses appear excessive; however, those calculations are not necessary for the motion. The U.S. Trustee would reserve the right to challenge the expenses at an evidentiary hearing.

8. Average monthly net income of \$ 5,424.67 less average monthly expenses of \$ 3,953.18 per month provides the debtors with monthly disposable income of \$ 1,471.49 per month.

9. Monthly disposable income of \$ 1,471.49 per month provides the debtors with the ability to pay approximately \$ 52,973.64 or 55.7% of their unsecured debts in a hypothetical

²This figure does not include voluntary reductions for retirement. Voluntary contributions to retirement/pension accounts are not reasonable or necessary expenses for determining disposable income and that said contributions should be reflected in the calculation of disposable income. See e.g. *In re Harshbarger*, 66 F.3d 775 (6th Cir.1995) (adopting per se rule that voluntary contributions into 401K account are disposable income for Section 1325 purposes); *In re Anes*, 195 F.3d 177 (3rd Cir.1999) (adopting per se rule that voluntary contributions to retirement plan constitute disposable income under Section 1325) *In re Taylor*, 243 F.3d 124 (2d Cir.2001) (adopting a case by case test to look at the age of the debtor, the mandatory nature of the contributions and impact on employment, dollar amount of any penalties, and other circumstances); *In re Delnero*, 191 B.R. 539, 542 (Bankr. N.D.N.Y. 1996); *In re Cornelius*, 195 B.R. 831 (Bankr. N.D.N.Y. 1995); *In re Cavanaugh*, 175 B.R. 369, 373 (Bankr. D. Idaho 1994); *In re Scott*, 142 B.R. 126, 135 (Bankr. E.D. Va. 1992) (not reasonably necessary under §1325(b)); *In re Fountain*, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992) (cannot make voluntary contribution unless pay Ch. 13 creditors in full); *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991); *In re Colon Vazquez*, 111 B.R. 19, 20 (Bankr. D. Puerto Rico 1990); *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985); *In re Harshburger*, 66 F.3d 775, 777 (6th Cir. 1995) (Ch 13 case: not necessary for maintenance or support); *Collins v. Hesson (In re Hesson)*, 190 B.R. 229, 237-38 (Bankr. D. Md. 1996).

thirty six month Chapter 13 Plan. The debtors can pay \$ 88,289.40 or 93% of the unsecured creditors in a hypothetical sixty month Chapter 13 Plan.

10. Based on the information provided by the debtors, it appears that the debtors have an ability to pay a portion of their unsecured debts in a hypothetical Chapter 13 plan.

WHEREFORE, the United States Trustee respectfully supplements his motion to dismiss this case for substantial abuse.

Dated: July 9, 2004

Respectfully submitted,
HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
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VERIFICATION

I, Sarah J. Wencil, attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: July 9, 2004

Signed: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney

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CERTIFICATE OF SERVICE

I, Terri Frazer, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

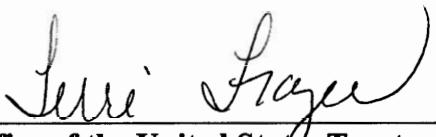
That on July 9, 2004, I served a copy of the Supplement to Motion to Dismiss Under 11 U.S.C. §707 in the above-referenced case by faxing said copy to counsel for the debtor and by mailing a copy through the United States Mail at Minneapolis, Minnesota.

Addressee(s):

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**Office of the United States Trustee
Terri Frazer**